Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

NO. 76-1843

MARGARET OLLESTEAD, MARY VAN WINKLE, KATHERINE O. SOWELL, OLIVE KAPUS, and EMIL A. FONDAHN,

Petitioners,

v.

NATIVE VILLAGE OF TYONEK, a Federal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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June 13, 1977

BEN GRAY'S PRINT SHOP, INC.

IN THE

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Petitioners,

v.

NATIVE VILLAGE OF TYONEK, a Federal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

The Petitioners, Margaret Ollestead, Mary Van Winkle, Katherine O. Sowell, Olive Kapus, and Emil A. Fondahn, pray that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Alaska rendered in these proceedings on February 16, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Alaska, reported at 560 P.2d 31, appears at Appendix A, infra, p. A1. The Memorandum and Order of the Superior Court of Alaska, Third Judicial District, is unreported, and appears at Appendix B. infra, p. B1.

JURISDICTION

The order or judgment of the Supreme Court of Alaska was entered on February 16, 1977. See Appendix A, p. A1, infra. A timely petition for rehearing was denied on March 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Whether the Superior Court of the State of Alaska has jurisdiction of the subject matter of a dispute between Indians of the State of Alaska who claim to be members of an Indian tribe and a tribe which denies that they are members.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V.

> "No person shall . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Constitution of the United States, Amendment XIV, Section 1.

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law; . . ."

Constitution of the State of Alaska, Article I, Section 7.

> "No person shall be deprived of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

The Petitioners are members of the Tyonek or Moquawkie Indian Tribe which has occupied since before

recorded history certain lands which include the village of Tyonek. The Appellee is a federal corporation chartered pursuant to the Act of June 18, 1934, as amended by the Act of May 1, 1936, (25 U.S.C.A. 461 et seq.). By Executive Order No. 2141, the President of the United States, on February 22, 1915, reserved for the Indian people of the Moquawkie Tribe or Tyonek Tribe certain lands. The lands so reserved are described as follows:

> "Beginning at Granite Point, a headland projecting into Cook Inlet about five (5) miles southwest from Tyonek, and approximately in latitude 61 degrees 0 minutes North and longitude 151 degrees 21 minutes West, which point is also marked by large rocks exposed at low tide; running thence westward with the shore one-half (1/2) mile to a point; thence north to the middle of the main current of the Chuit River, eight (8) miles more or less; thence with the main channel of said stream to where it discharges into Cook Inlet thence along the shore thereof southeasterly to the point of beginning; estimated to include 25,000 acres."

The First Organic Act of Alaska, 23 Stat. 24, and subsequent acts (Section 27 of the Act of June 6, 1900, 31 Stat. 330, 48 U.S.C.A. 356, Section 14 of the Act of March 3, 1891, 26 Stat. 1095, and Section 7 of the Act of May 14, 1898, 30 Stat. 412), grant the Indian natives of the Moquawkie Tribe or Tyonek Tribe the exclusive right to use, occupy, enjoy and possess these lands. Section 8 of the first Organic Act of Alaska, which is herein applicable, provides:

> "The Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

This section has never been repealed by Congress and is still in force and effect. The Alaska Native Claims Settlement Act, 85 Stat. 688, 43 U.S.C. 1601 et seq., is the "future legislation" establishing terms under which such persons may acquire title. That Act is not controlling here because the lands involved were reserved to the Tyonek Tribe by the Executive Order of February 22, 1915. Indian members of the Moquawkie Tribe or Tyonek Tribe occupied the lands referred to on the effective date of that Act (23 Stat. 24) and have continuously occupied the land since that date.

The Respondent has denied that the Petitioners are members of the Tyonek Tribe and has refused them the right to exclusive possession, use, occupation, and enjoyment of the area encompassing the Town of Tyonek and has further refused them incidental rights arising out of their right to exclusive possession, use, occupation, and enjoyment of the above described lands.

The Petitioners instituted the present action in the Superior Court of the State of Alaska seeking a declaration that they are members of that tribe and that they are entitled to share in all of the benefits of membership in the tribe, including the right of use, occupation, and enjoyment of tribal lands and to share in all incidental benefits of membership in the tribe.

After hearing arguments of opposing counsel on cross motions for summary judgment, the court in a Memorandum and Order dated March 27, 1975, concluded that it lacked jurisdiction of the subject matter and denied both motions for summary judgment and dismissed the action. On appeal, the Supreme Court of the State of Alaska affirmed on the ground that the Superior Court lacked jurisdiction to grant the relief requested.

REASONS FOR GRANTING THE WRIT

Petitioners instituted this action for the purpose of obtaining a declaration that they are members of the Tyonek Indian Tribe. The action was dismissed by the Superior Court of the State of Alaska on the grounds that it lacked jurisdiction of the subject matter. (See Exhibit B.) On appeal the action of the

Superior Court of Alaska was affirmed by the Supreme Court of the State of Alaska on the grounds that the Superior Court "lacked jurisdiction to grant the requested relief." Ollestead v. Native Village of Tyonek, 560 P.2d 31, 36 (Alaska 1977) An almost identical action was previously brought in the United States District Court for the District of Alaska and was dismissed for lack of jurisdiction of the subject matter. See Fondahn v. Native Village of Tyonek, 450 F.2d 520 (9th Cir. 1971). The conclusion which must be drawn if these decisions are correct is that there does not exist any forum in which these citizens may obtain an adjudiction of whether they are entitled to be members of the Tyonek Tribe and to the benefits of such membership, whatever they maybe.

> "Access to the courts is a contitutional right guaranteed by the due process clauses of the Fifth and Fourteenth Amendments." Silver v. Cormier, 529 F.2d 161, 163 (10th Cir 1976).

Petitioners have effectively been denied access to the courts, both state and federal upon the theory that Indian tribes have exclusive jurisdiction to decide questions of their own membership. But this theory has been rejected where the right to participate in the benefits of membership is involved and as applying to native villages of Alaska, because, unlike other Indian tribes, they have no courts or established legal system. The Alaska Supreme Court has overstepped the issue of what forum is the appropriate one to decide the question of membership in the Tyonek Tribe and looked to what benefits of membership might be established by the Petitioners and concluded that it lacked jurisdiction to grant particular kinds of relief. As a consequence, Petitioners have been denied a plenary hearing at which their evidence in support of their contentions of membership in the Tyonek Tribe could be heard and they have been denied the opportunity to identify precisely, through discovery, the benefits in which they could claim a right to share if they established that they are members or have a right to be members of the Tyonek Tribe.

Congress has expressly conferred jurisdiction of causes of action such as here presented upon the Courts of the State of Alaska. See 28 U.S.C.A. 1360(a). This section, derived from the Act of August 15, 1963, c.505, Sec. 4, 67 Stat. 589 originally conferred jurisdiction over civil causes of action between Indians or to which Indians are parties and arising in the areas of Indian country upon the courts of five states. This section was amended by the Act of August 8, 1958, Pub.L. 85-615, Sec. 2, 72 Stat. 545 to extend its provisions to the Territory of Alaska. The legislative history of this amendment is particularly illuminating in understanding the problem presented in this case. See 1958 U.S. Code Cong. and Admin. News, p.3347.

Congress conferred jurisdiction of both civil and criminal causes of action involving Indians and arising in Indian territory on the Alaska courts as a result of certain decisions which focused attention on differences between the native villages of Alaska and some other Indian "tribes". The following excerpt from Senate Report No. 1872 on H.R. 9139 (72 Stat. 545) explains these differences.

> "In construing the Federal statutue the court also decided that the native village of Tyonek, Alaska, where the rape occurred, came within the definition of Indian country. Such a construction affects a large number of other native villages in Alaska similarly situated. The committee has been advised that these native villages do not have adequate machinery for enforcement of law and order. They have no trial court, no police, no criminal code, and in many instances no formal organization. This is for the reason, that the Territorial government in Alaska has maintained law and order in the native villages as well as in the rest of Alaska and the native tribal councils have had no reason to nor have they ever exercised these functions. Since the natives are not prepared to take over

> these activities, the recent court decision has left the village and the people without protection. The instant legislation seeks to remedy this situation by restoring what, until the court decision, was the actual practice in the Indian country in Alaska."
>
> "The bill also extends the Territorial law of Alaska to Indian country with regard civil matters. This action is consistent with previous enactments of Congress, as in the case of Public Law 280, 83rd Congress, whereby criminal and civil jurisdiction over Indian country within the States of California, Minnesota, Nebraska, Oregon and Wisconsin was transferred to those States." Id. (emphasis added)

The foregoing clearly demonstrates that there is not now nor has there ever been any mechanism for decision according to tribal law of disputes such as that presented in this case. This jurisdiction has always been exercised by the Territorial (now State) courts where it is now fixed by statute. This legislative history is especially relevant because the incidents reported to Congress as necessitating this legislation occurred in the native village of Tyonek, the defendant village in the case at hand. It was the lack of legal machinery in the native village of Tyonek which prompted Congressional action.

In its short memorandum and order dismissing the complaint in this action, the court below cited as authority for its decision the cases of Martinez v. Southern Ute Tribe of Southern Ute Reservation, 249 F.2d 915 (10th Cir 1957) and Fondahn v. Native Village of Tyonek, 450 F.2d 520 (9th Cir. 1971). It is respectfully submitted that those cases are not appropriate precedents for the court's decision, and that the continued authority of those cases for even the narrow questions which they decided is doubtful.

First, both of the cited cases were dismissed from the Federal courts for lack of jurisdiction of the subject matter. The failure of federal jurisdiction in a similar case is not conclusive

as to the lack of jurisdiction of a state court. On the contrary, it may suggest the opposite, for normally an aggrieved party is entitled to judicial review in some forum.

Of course, the rationale of the cited cases was that the Indian Tribe itself would provide the forum. But as shown by the above quoted legislative history, the native village of Tyonek does not have, nor did it ever have such a forum. The legal principles cited in those cases concerning an Indian tribe's authority to determine its own membership were developed in the context of Indian tribes denominated as nations, exercising a broad range of governmental functions including the adjudication of disputes. In Fondahn, supra, these principles were applied to the native villages of Alaska because 25 U.S.C.A. 473(a) (Act of May 1, 1936, c.254, §1,49 Stat. 1250) amended the Indian Reorganization Act to permit the native villages to organize as Indian tribes.

The Indian Bill of Rights (25 U.S.C.A. 1301 et seq.) enacted in 1968 imposed upon Indian tribes exercising powers of self-government the limitations which the Bill of Rights places upon the federal and state governments.

> "There are many cases supporting the conclusion that prior to the 1968 Act constitutional rights were not applicable to Indian tribes and Indians living on reservations. The leading case is Talton v. Mayes, 163 U.S. 376, 16 S. Ct. 986, 41 L.Ed. 196 (1896) wherein the Supreme Court held that the Fifth Amendment was not applicable to the Cherokee Nation."
>
> "This rationale was followed in subsequent cases involving the application of the Bill of Rights and the Fourteenth Amendment to the Indian Tribes." Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974).

An Indian tribe may not now deny any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. 25 U.S.C.A. 1302(8). It has been suggested, that as a consequence,

both Fondahn and Martinez may no longer be good law. See Laramie v.Nicholson, 487 F.2d 315 (9th Cir. 1973).

As a result of 25 U.S.C.A. 1322(a), any state may with the consent of the affected tribes assume jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in Indian country if it does not already have that jurisdiction. But this section does not apply to the State of Alaska which had such jurisdiction as a result of 28 U.S.C.A. 1360 before enactment of 25 U.S.C.A. 1322(a) and the Indian Bill of Rights.

While it is generally held (See Martinez, supra and cases cited therein) that Indian tribes have complete authority to determine questions involving their own membership, the authority is not without qualification. Cohen, Handbook of Federal Indian Law, 135 (1942). Where the question presented involves an interest in tribal lands, jurisdiction in the tribe alone has not been recognized. U.S. ex rel. West v. Hitchcock, 205 U.S. 80, 27 S.Ct. 423, 51 L.Ed. 718 (1906); Powers of Indian Tribes, 55 I.D. 14, 39 (1934). A more correct description of the jurisdiction of Indian courts may be that it is original but not exclusive. State Securities, Inc. v. Anderson, 506 P.2d 786 (Sup. Ct. N.M., 1973). But where, as in this case, there does not exist the machinery for the adjudication of disputes and Congress in expressed recognition of the absence of such machinery has conferred jurisdiction on the courts of Alaska, it is clear that the requirement of due process demands that the Petitioners in this case be afforded a plenary hearing on the merits of their case in the Superior Court of Alaska.

It was argued before the court below that the claims of the Appellants are barred because the Secretary of the Interior has approved a final membership roll of the native village of Tyonek and their names do not appear on that roll Unanswered, this argument might create the appearance that if this matter were remanded, there would still be no facts upon which the Appellants might reasonably prevail. Such an appearance is not correct.

The authority of the Secretary of the Interior to approve a final roll of the membership of an Indian tribe is derived from 25 U.S.C.A. 163, Act of June 30, 1919, c.4, Sec. 1, 41 Stat. 9. That section provides:

> "The Secretary of the Interior is authorized, wherever in his discretion such action would be for the best interest of the Indians to cause a final roll to be made of the membership of any Indian tribe; such rolls shall contain the ages and quantum of Indian blood, and when approved by the said Secretary are declared to constitute the legal membership of the respective tribes for the purpose of segregating the tribal funds as provided in section 162 of this title, and shall be conclusive both as to ages and quantum of Indian blood: Provided that the foregoing shall not apply to the Five Civilized Tribes or to the Osage Tribe of Indians, or to the Chippewa Indians of Minnesota, or the Menominee Indians of Wisconsin." (emphasis added)

By its own terms, this section limits the use which may be made of a final roll approved by the Secretary. It may be used for the purpose of segregating tribal funds as provided in 25 U.S.C.A. 162. The roll is not for any other purpose. But it should be noted that section 162 of Title 25 has been repealed by the Act of June 24, 1938, c.648, Sec. 2, 52 Stat. 1037.

It is even the position of the Department of the Interior that membership rolls prepared pursuant to 25 U.S.C.A. 163 are not conclusive of membership in an Indian tribe for any purpose except the distribution of tribal funds.

> "In a memorandum opinion by the Solicitor for this Department dated May 17, 1941, it was held that tribal rolls made and approved under the Act of 1919 are required to be used only for the completion of the distribution of such funds as have been segregated under the Act of 1918 and remain undistributed. As

> pointed out in that opinion neither act contains any provision requiring that the approved roll shall govern the tribal membership thereafter in such matters as voting in tribal affairs, organizing under a tribal constitution, sharing in the use of tribal land and credit funds, or for any other purpose, even the allotment of lands, save for the distribution of tribal funds susceptible of segregation. Per Capita Payment to Flathead Indians, 58 I.D. 628, 634. (1944)

If the approval of a final membership roll for the native village of Tyonek is conclusive for any purpose, which it may not be in view of the repeal of 25 U.S.C.A. 162, it is certainly limited to use in connection with per capita payments of funds segregated under the 1918 Act. But the Appellants have not sought to compel such a per capita payment. They have merely requested a judicial determination that they are in fact members of the native village of Tyonek, entitled to the use and possession of tribal lands and assets on the same basis as other members of the tribe. Therefore, the membership roll approved by the Secretary of the Interior is not conclusive of the rights asserted in this case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Alaska.

Respectfully submitted,

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June 13, 1977

THE SUPREME COURT OF THE STATE OF ALASKA

MARGARET OLLESTEAD, MARY VAN WINKLE, KATHERINE O. SOWELL, OLIVE KAPUS and EMIL A. FONDAHN,
Appellants,

v.

NATIVE VILLAGE OF TYONEK, a Federal Corporation,
Appellee.

File No. 2503
OPINION
[No. 1384 –
February 16, 1977]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Edmond W. Burke, Judge.

Appearances: C. R. Kennelly, Kennelly & Azar, Anchorage, for Appellants. William J. Donohue, Anchorage, for Appellee.

Before: Boochever, Chief Justice, Rabinowitz, Connor and Erwin, Justices. [Burke, Justice, not participating.]

BOOCHEVER, Chief Justice.

This appeal concerns the jurisdiction of the courts of Alaska to decide whether appellants are members of the Native Village of Tyonek (the Village) which was organized pursuant to the Act of June 18, 1934 (48 Stat. 984).[1]

The superior court dismissed the action relying on Fondahn v. Native Village of Tyonek, 450 F .2d 520 (9th Cir. 1971), and Martinez v. Southern Ute Tribe, 249 F .2d 915 (10th Cir. 1957), which denied federal court jurisdiction of

[1]This Act is commonly known as the Indian Reorganization Act or the Wheeler-Howard Act. It was amended by the Act of May 1, 1936 (49 Stat. 1250) to apply to the Native villages of Alaska.

membership disputes. It concluded that authority to decide such disputes lies solely with the tribe itself. Although our view of the jurisdicational issue differs from that of the superior court, we affirm the judgment below.

Appellants sought a declaratory judgment holding them entitled to rights in the area encompassing the town of Tyonek and shares in the proceeds from certain oil and gas leases which they allege amount to approximately $15,000,000.00. The historical background of their claim is set forth in Fondahn, supra, where the United States Court of Appeals for the Ninth Circuit considered its authority to decide a similar controversy:

> Pursuant to Executive Order No. 1241, dated February 27, 1915, a twenty-five thousand (25,000) acre tract of land at Tyonek, Alaska was withdrawn and reserved for the use of the "U.S. Bureau of Education."[1] A letter dated February 25, 1915, from the Secretary of the Interior to President Woodrow Wilson, and a letter dated March 5, 1915, from the President's secretary to the Secretary of the Interior, both state that the withdrawal and reservation of the land were for the benefit of "Alaskan Natives of that region."
>
> Appellee, the Native Village of Tyonek, is a corporation organized under 25 U.S.C. § 477. The local government of the reservation is the Tyonek Tribal Council which is recognized by the United States as the spokesman for the people of Tyonek in all reservation affairs.
>
> In 1963, pursuant to 25 U.S.C. § 398(a), the Secretary of the Interior, with the Council's consent, granted oil and gas leases covering a portion of the reservation. The proceeds of these leases are federal funds held for the use and benefit of the Tyonek Indians, who are to be consulted regarding the expenditure of funds. Per capita payments are, however, expressly forbidden by 25 U.S.C. § 398b.
>
> 25 U.S.C. § 463 authorizes the Secretary of the Interior, in his discretion, to prepare a final roll of the Tyonek tribe, which, when approved by him, constitutes the legal membership of the tribe for the purposes of segregating tribal funds. On March 31, 1965, the Secretary approved the final Tribal Membership Roll of the Village of Tyonek. Appellant's name does not appear on this roll. (footnotes 2-4 omitted)

[1] Administrative jurisdiction over the education and other services for the Natives of Alaska was later transferred to the Office of Indian Affairs, Department of the Interior.

The principle that Indian tribes are sovereign, self-governing entities subject only to the plenary power of Congress was established in Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832). Although modified over the years, this principle still applies in all cases where essential tribal relations or rights of Indians are involved. See, e.g., Williams v. Lee, 358 U.S. 217, 220-21, 3 L. Ed. 2d 251, 254 (1959). Indian affairs are subject to state law but only to the extent that Congress explicitly so provides.[2] Thus, both federal and state court jurisdiction over membership disputes must be founded on some Congressional act.

[2] See Bryan v. Itasca County, ___U.S.___, 48 L. Ed. 2d 710 (1976). The Supreme Court in Bryan rejected the contention that the grant of jurisdiction over Indians contained in 28 U.S.C. § 1360(a) was to be considered plenary except to the extent it was specifically limited. It held that in the absence of express authorization by Congress, Minnesota was without power to levy personal property taxes on reservation Indians.

Until the passage of the so-called Indian Bill of Rights, 25 U.S.C. §§ 1301 et seq. (82 Stat. 77) (1968), Congress had not conferred any such jurisdiction on the federal courts. It was on this basis alone that jurisdiction was denied in Fondahn and Martinez.[3] The Tenth Circuit concluded that in the absence of express legislation by Congress:

> a tribe has complete authority to determine all questions of its own membership, as a political entity, . . . [except as such authority has been qualified by 25 U.S.C. § 163] where the question involved is the distribution of tribal funds and other property under the supervision and control of the federal government.

When Congress passed the Indian Bill of Rights, the Tenth Circuit then recognized that federal courts might have jurisdiction over membership disputes. Slattery v. Arapahoe Tribal Council, 453 F .2d 278, 281 (10th Cir. 1971). In Johnson v. Lower Elwha Tribal Community, 484 F .2d 200, 202 (9th Cir. 1973), the Ninth Circuit expressly held that the Indian Bill of Rights conferred jurisdiction on federal courts. Fondahn was distinguished the same year in Laramie v. Nicholson, 487 F .2d 315, 316 (9th Cir. 1973), cert. denied, sub nom. Tonasket v. Thompson, 419 U.S. 871, 42 L. Ed. 111 (1975):

> It is true that [Fondahn] was decided in 1971, more than three years after the enactment of the Indian Bill of Rights on April 11, 1968. But it is also true that the statute was not brought to our attention, and we did not even purport to decide what its effect upon jurisdiction might be. Instead, we followed pre 1968 law, adopting and applying the reasoning of the Tenth Circuit in Martinez v. Southern Ute Tribe, 10 Cir., 1957, 249 F .2d 915. The Tenth Circuit has indicated that Martinez may no longer be good law.

The exclusivity of federal jurisdiction over Indian matters in Alaska was eliminated by a 1958 amendment to 28 U.S.C. § 1360(a) which gave Alaska jurisdiction over "civil causes of action between Indians or to which Indians are parties" which arise in areas of Indian country within the then Territory. This provision suggests that state courts are vested with authority to decide corporate membership disputes among Indians[4] including those involving claims under the Indian Bill of Rights.[5] Since, however, we have concluded that § 1360(b) would preclude the assertion of jurisdiction pursuant to § 1360(a) even if it were applicable, we decline to resolve the question of the extent of the jurisdictional grant found in § 1360(a). Subsection 1360(b) precludes state courts from

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[3]The state cases cited by the Village likewise focus on the lack of statutory confirmation of jurisdiction. See, e.g., Patterson v. Council of Seneca Nation, 157 N.E. 734, 739 (N.Y. 1927):

> We hold herely this: That the courts of the State of New York under existing laws, have no jurisdiction to control by mandamus order, running to the government of the Seneca Nation, the membership of that nation. (emphasis added)

See also Morgan v. Colorado River Indian Tribe, 443 P.2d 421, 424 (Ariz. 1968): "It is clear that congress alone must determine the extent to which immunities afforded tribal status must be withdrawn."

[4]The Supreme Court in Bryan, supra, indicated that:

> nothing in [the] legislative history [of 28 U.S.C. § 1360] remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist. . .

Bryan v. Itasca County, ____U.S. at____, 48 L. Ed. 2d at 721. See 28 U.S.C. § 1360(c). In this case, appellants admit that the Native villages of Alaska, including Tyonek, do not have a system of laws or tribal courts. Therefore, state assumption of jurisdiction to hear membership disputes would not interfere with any internal tribal or village affairs.

[5]See Comment, The Indian Bill of Rigths and the Constitutional Status of Tribal Governments, 82 Harv. L. Rev. 1343, 1346 n.10 (1969) Where Congress has eliminated federal exclusivity in jurisdictional matters, the state courts have jurisdiction to hear federal claims. See Williams v. Lee, 358 U.S. 217, 221, 3 L. Ed. 2d 251, 254 (1959).

adjudicating the ownership or right to possession of property or an interest therein belonging to an Indian tribe or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.[6] We must therefore determine whether the resolution of appelants' membership claim involves a determination of rights in restricted or trust property.

The only pieces of property at issue here are lands set

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[6] 28 U.S.C. § 1360 provides:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over covil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:
>
> • • •
>
> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.
>
> • • •
>
> (c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

aside by Executive Order 2141 and the proceeds from the oil and mineral leases of that property. Considering first the real property, we find two applicable restrictions. The Act of May 1, 1936 which extended the provisions of the Indian Reorganization or Wheeler-Howard Act to Alaska Native villages, supplied the provisions under which the Native Village of Tyonek was federally incorporated. It provided that "no authority shall be granted to sell, mortgage or lease for a period exceeding ten years any of the land included in the limits of the reservation."[7] Thus, the lands obtained by the Village within the limits of the reservation were subject to a restriction against alienation.

A second restriction is found in Section 5 of the corporate charter of the Village which prohibits the Village from using its powers to:

> Sell or mortage any land set aside as a reserve for the Village; Make leases, permits or contracts covering any lands or waters set aside as a reserve for the Village without

---

[7] 25 U.S.C. § 447 provides:

> The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress. (emphasis added)

the approval of the Secretary of the Interior or his authorized representative.

In 1971, however, as part of the Alaska Native Claims Settlement Act, Congress passed 43 U.S.C. § 1618(a) which revoked the reservations previously established for Native use with the exception of the Annette Island Reserve. The lands were withdrawn from reservation or reserve status for the purpose of selection by the newly created village corporations under the Settlement Act. Those corporations are state, rather than federal entities,[8] and appellants herein do not seek relief with reference to them.

Since there thus appears to be no real property in which appellants would be entitled to share if adjudicated members of the federal corporation,[9] the thrust of the declaratory judgment action centers on the proceeds from the oil leases previously executed when the land was in reservation status. Title 25 U.S.C. § 398b provides that proceeds from such leases:

> shall be depostied in the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land . . . Provided . . . no per capita payment shall be made except by Act of Congress.

This property is thus both held in trust and subject to a restriction on alienation. It therefore triggers the jurisdictional limitation contained in § 1360(b).

Thus, assuming arguendo that the superior court had jurisdiction by virtue of § 1360(a) to determine membership in the Village, such determination would not be effective as to rights in property held in trust and subject to restrictions on alienation. An integral part of the relief sought by the plaintiffs, however, is a declaration of right:

> to all incidental benefits [of membership] including fifteen million dollars ($15,000,000.00), more or less, arising out of such right to exclusive possession, use occupation, and enjoyment as any other member of the Tyonek Tribe . . .[10]

A state court adjudication of questions of tribal membership would necessarily encompass issues of ownership or right to possession of property held in trust and subject to restrictions on alienation. The state has no jurisdiction "to adjudicate . . . the ownership or right to possession of such property or any interest therein." 28 U.S.C. § 1360(b).

We conclude that the superior court lacked jurisdiction to grant the requested relief.[11]

AFFIRMED.

---

[8] See 43 U.S.C. § 1602.

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[9] The Village asserts that:

> the federal government has consistently refused to recognize that the . . . [real property involved here] is an Indian Reservation. The government has recognized, however, that these lands were withdrawn for the benefit of Tyonek members.

We need not pass on the validity of this contention. Even if the property were not part of a reservation and is therefore land in which appellants would otherwise be entitled to share as members of the Village, such land would be property held in trust by the United States, and the jurisdictional prohibitions of 28 U.S.C. § 1360(b) would bar an action in state court.

---

[10] Paragraph 1, demand for relief, plaintiffs' amended complaint.

---

[11] In their brief on appeal, plaintiffs raise an additional argument. 25 U.S.C. § 1302(8) prohibits any Indian tribe from denying any person within its jurisdiction the equal protection of its laws or depriving any person of liberty or property without due process of law. Plaintiffs argue that a decision denying them access to state courts prevents them from securing a hearing in any forum. The decision in Fondahn v. Native Village of Tyonek, supra, would indicate an absence of federal jurisdiction. But as discussed previously, the United States Circuit Court of Appeals for the Ninth Circuit has clearly stated that the Fondahn case was based on the law prior to the enactment of the so-called Indian Bill of Rights, including 25 U.S.C. § 1302(8), and that the United States District Court has jurisdiction of such cases alleging denial of equal protection or deprivation of due process. Laramie v. Nicholson, 487 F .2d 315, 316 (9th Cir. 1973), cert. denied, sub nom Tonasket v. Thompson, 419 U.S. 871, 42 L. Ed. 2d 111 (1975). Thus if plaintiffs have an equal protection or due process claim, a federal forum is available to them.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

MARGARET OLLESTEAD, MARY VAN WINKLE, KATHERINE O. SOWELL, and OLIVE KAPUS,

Plaintiffs,

vs.

NATIVE VILLAGE OF TYONEK, a federal corporation,

Defendant.

No. 74-3697

MEMORANDUM AND ORDER

The parties have filed cross-motions for summary judgment pursuant to Rule 56, Rules of Civil Procedure. Following argument on the motion the matter was taken under advisement.

Having considered the pleadings, affidavits and all other papers filed herein, together with the arguments of counsel, the Court concludes that it lacks jurisdiction of the subject matter of this litigation. See Martinez v. Southern Ute, 249 F .2d 915 (10th Cir. 1957); Fondahn v. Native Village of Tyonek, 450 F .2d 520 (9th Cir. 1971).

Having concluded that it lacks jurisdiction of the subject matter, the Court further concludes that upon such grounds an order of dismissal must be entered, rather than an order granting summary judgment in favor of defendant. Fondahn v. Native Village of Tyonek, supra. Accordingly the complaint will be dismissed.

IT IS SO ORDERED

DATED at Anchorage, Alaska, this 27th day of March, 1975.

Edmond W. Burke

EDMOND W. BURKE
Superior Court Judge

EXHIBIT "B"1

THE SUPREME COURT OF THE STATE OF ALASKA

MARGARET OLLESTEAD, MARY VAN WINKLE, KATHERINE O. SOWELL, OLIVE KAPUS and EMIL A. FONDAHN,

Appellants,

v.

NATIVE VILLAGE OF TYONEK, a Federal Corporation,

Appellee.

File No. 2503

ORDER

Upon consideration of the Petition for Rehearing filed on February 28, 1977,

By direction of the Court, IT IS ORDERED:

The Petition for Rehearing is denied.

DATED this 14th day of March, 1977.

CLERK OF SUPREME COURT

Donna Spragg Pegues

[Justice Erwin not participating in consideration of the petition for rehearing]

Filed and entered MAR 14 1977
SUPREME COURT of the State of Alaska
DONNA SPRAGG PEGUES Clerk
By Connee Staska Deputy

Exhibit "C"1

Supreme Court, U. S.
FILED
OCT 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

NO. 76-1843

MARGARET OLLESTEAD, MARY VAN WINKLE,
KATHERINE O. SOWELL, OLIVE KAPUS,
and EMIL A. FONDAHN,

Petitioners,

v.

NATIVE VILLAGE OF TYONEK,
a Federal corporation,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RUSSELL E. MULDER
Carr-Gottstein Building
310 K Street, Suite 403
Anchorage, Alaska 99501

WILLIAM J. DONOHUE
Carr-Gottstein Building
310 K Street, Suite 403
Anchorage, Alaska 99501

October 14, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

NO. _____

MARGARET OLLESTEAD, MARY VAN WINKLE,
KATHERINE O. SOWELL, OLIVE KAPUS,
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25 U.S.C. 1302 (8)

28 U.S.C. 1360(a),(b)

IN THE

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NO. _____

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Petitioners,

v.

NATIVE VILLAGE OF TYONEK, a Federal corporation,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

The Respondent, Native Village of Tyonek, prays that the petition for writ of certiorari submitted in this case be denied.

REASONS FOR DENYING THE WRIT

1. FEDERAL FORUM AVAILABLE

Petitioners, at page 5 of their Brief, suggest as follows:

> The conclusion which must be drawn if these decisions are correct is that there does not exist any forum in which these citizens may obtain an adjudication of whether they are entitled to be members of the Tyonek Tribe and to the benefits of such membership, whatever they may be.

This contention is clearly incorrect. There is a federal forum available. Laramie v. Nicholson, 487 F.2d 315 (9th Cir. 1973). Thus the "access to courts" argument by petitioner is clearly without merit. The Laramie case, supra, involved an action very similar to the case at bar. The appealing plaintiffs were children of a woman who was a member of the Colville Confederated Tribe of Indians. They sought to be enrolled as members of the tribe. The trial court judge dismissed the action, relying on the Fondahn case, supra. In reversing the decision of the trial court, the Court states as follows at page 316 of the Opinion:

> Plaintiffs claim that violation of the so-called Indian Bill of Rights, 25 U.S.C. 1301-1303, enacted in 1968 (82 Stat. 77), gives rise to a civil action and that 28 U.S.C. 1343(4) confers jurisdiction on the District Court. We agree. We have recently so held. Johnson v. Lower Elwha Tribal Community, 9 Cir. 1973, 484 F.2d 200 (1973). . . . Our decision in Fondahn, supra, is not to the contrary. . . . The statute was not brought to our attention, and we did not even purport to decide what its effect on jurisdiction might be. . . .

The Supreme Court of Alaska in the instant case noted, at Footnote 11 in the Opinion, as follows:

> Plaintiffs argue that a decision denying them access to state courts prevents them from securing a hearing in any forum. The decision in Fondahn v. Native Village of Tyonek, supra, would indicate an absence of federal jurisdiction. But as discussed previously, the United States Court of Appeals for the Ninth Circuit has clearly stated that the Fondahn case was based on the law prior to the enactment of the so-called Indian Bill of Rights, including 25 U.S.C. 1302(8), and that the United States District Court has jurisdiction of such cases alleging denial of equal protection of deprivation of due process. (citing cases) Thus if plaintiffs have an equal protection or due process claim, a federal forum is available to them (see Petitioners' Brief at page A-9).

Respondents respectfully submit that the above-quoted statement from page 5 of the instant brief by petitioners is totally without merit, and a federal forum does exist for resolution of the instant dispute.

II. FEDERAL FORUM PREFERABLE

The Supreme Court for the State of Alaska held, and apparently petitioners do not disagree with this holding, that Indian affairs are subject to state law, but only to the extent that Congress explicitly so provides. Bryan v. Itasca County, 48 L.Ed.2d 710 (1976). For the following reasons, respondent respectfully submits that the federal forum is the preferable forum in order to adjudicate the relief requested by the petitioners in this case.

A. PETITIONERS' REQUEST CANNOT BE FULLY GRANTED BY THE COURTS OF THE STATE OF ALASKA DUE TO THE PROVISIONS OF 28 U.S.C. 1360(b).

The request of the petitioner, in a nutshell, is set forth at page 11 of their Brief as follows:

> They have merely requested a judicial determination that they are in fact members of the Native Village of Tyonek, entitled to the use and possession of tribal lands and assets on the same basis as other members of the tribe.

Thus, in order for the Courts of the State of Alaska to grant petitioners complete relief, the declaration would, of necessity, include a declaration concerning the petitioners' entitlement to the use and possession of tribal lands. It is submitted that the Courts for the State of Alaska are without jurisdiction to grant this relief. 28 U.S.C. 1360(b) provides, in pertinent part, as follows:

> . . . or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

It is therefore clear that the Courts of the State of Alaska would be without jurisdiction to grant complete relief to petitioners, even if the question of "bare membership" were resolved and a State Court judgment to this effect were obtained.

B. A STATE COURT DETERMINATION OF "MEMBERSHIP" ALONE WOULD EITHER BE VIOLATIVE OF 28 U.S.C. 1360(b) OR WOULD BE A USELESS ACT.

The Alaska Supreme Court, in its wisdom, looked to the nature of the relief requested by the petitioners herein and found that the only property at issue is land set aside by Executive Order 2141 and the proceeds from the oil and mineral leases of that property. The Alaska Supreme Court examined this property and found that, indeed, such property was in fact subject to a restriction against alienation imposed by the United States, thus triggering the exclusionary provisions of 28 U.S.C. 1360(b). Since the Alaskan State Court adjudication of "bare membership" would be of neces-

State Court adjudication of "bare membership" would of necessity carry with it a proviso limiting the effect of any such judgment, so as not to conflict with 28 U.S.C. 1360(b), it appears that the granting of such a judgment would be a useless act. In the federal forum, wherein the question as to petitioners' right to use and possession of federal lands would be adjudicated, the State Court judgment as to tribal membership would, of necessity, have no res judicata effect. It is submitted that the question of tribal membership would have to be relitigated in the federal forum, for if the State Court judgment as to membership were given any res judicata effect, then the Village could correctly argue that 28 U.S.C. 1360(b) had been violated.

Of course, petitioners might argue that such a State Court judgment, although not binding, may be considered by the federal

court as one of the "factors" in resolving the true issues presented by the instant petition, it appears that a full resolution of the problem cannot be had in the state courts. Clearly, the federal forum is the correct forum.

As noted by petitioners at pages 9 and 10 in their Brief, the Secretary of the Interior should be made a party if the issues presented are to be fully and finally adjudicated. If the Secretary of Interior is a proper party, then the provisions of Alaska Civil Rule 19 would apply. Since the Secretary of Interior may not be made a party to the lawsuit in state court, the state court judgment would not in any way affect the Secretary's rights or liabilities. See Alaska Civil Rule 19(b).

This is but another reason why the federal forum would be preferable to adjudication of the questions presented by the instant Petition for Certiorari.

III. CONCLUSION

In conclusion, it is submitted that the true underlying justifications set forth by Petitioners for the grant of certiorari in this case is incorrect. That assertion is that there does not exist any forum in which plaintiffs may obtain an adjudication of whether they are entitled to be members of the Tyonek tribe and to the benefits of such membership. This issue may be resolved in the federal courts. Petitioners have supplied this Court with no justification for failing to pursue the case in federal court other than the dismissal of a similar case. See Fondahn v. Native Village of Tyonek, 450 F2d 520 (9th Cir. 1971). In the Fondahn case, however, the argument presently set forth by petitioners was not made.

The Petition should also be denied for the reason that any state court adjudication concerning tribal membership would, of necessity, carry with it a determination as to rights in property held in trust for the Indians by the United States. Thus the state court lacks jurisdiction due to the provisions of 28 U.S.C. 1360(b).

Respondent submits that any adjudication by the Alaskan

State Courts concerning tribal membership would, of necessity, violate 28 U.S.C. 1360(b). If there exists any independent reason for the application of 28 U.S.C. 1360(a), respondent submits that petitioners have failed to adequately set forth this reason in their Petition. Additionally, respondents submit that such a result in this case would simply serve to further confuse and protract the litigation due to the lack of jurisdiction in the state courts over certain other parties which are clearly indispensable to the issues presented.

For the reasons stated, respondents respectfully urge that the Petition for Writ of Certiorari to the Supreme Court of the State of Alaska be denied.

Respectfully submitted,

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